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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

THOMAS DIXON,
Appellant-Respondent,

v.

THE STATE OF TEXAS,
Appellee-Petitioner.

On Discretionary Review from the
Seventh Court of Appeals for the State of Texas,
No. 07-16-00058-CR;
On Appeal from the
140th District Court of Lubbock County, Texas
No. 2012-435,942.

APPELLANT'S MOTION FOR REHEARING

Requesting oral argument

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TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

Thomas Michael Dixon, Appellant, submits this motion for rehearing the decision on the State's Petition for Discretionary Review ("PDR") pursuant to Rule 79 of the Texas Rules of Appellate Procedure, and respectfully asks this Court to reconsider its opinion on the merits of that PDR dated January 15, 2020, which reversed the Seventh Court of Appeals' judgment and remanded the case to address issues not

previously considered. *Dixon v. State*, PD-0048-19, 2020 WL 223908 (Tex. Crim. App. Jan. 15, 2020).

Counsel requests oral argument on this rehearing, pursuant to Rule 79.4 of the Texas Rules of Appellate Procedure.

CRITICAL CONCLUSIVE AND DETERMINATIVE ISSUE

For better or worse, the Texas Constitution is crystal clear that decisions of Courts of Appeals "shall be conclusive on all questions of fact brought before them on appeal." Tex. Const. art. V, § 6.

> **"the state shall be divided into Courts of Appeals districts... *[T]he decisions* of said courts shall be conclusive on all issues of facts brought before them on appeal."** Tex. Const. art. V, § 6 (Emphasis Added).

For almost one and a half centuries, the express language of the Texas Constitution has made clear that the sole and conclusive decider of the facts in criminal appeals rests with the Courts of Appeals below. The Court of Criminal Appeals is subject to this provision of law in its jurisdiction section.[1] Accordingly, review of questions of facts are not within this Honorable Court's providence except with respect to direct appeals of death penalty cases.[1] This Honorable Court's jurisdiction on

[1] (a) The Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all

PDR is thus expressly limited to questions of law.[2] The State's PDR, which this Court decided, raises non-cognizable factual issues.[3]

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criminal cases of whatever grade, ***with such exceptions and under such regulations as may be provided in this Constitution*** or as prescribed by law.

(b) The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals. ***The appeal of all other criminal cases shall be to the Courts of Appeal as prescribed by law.*** In addition, ***the Court of Criminal Appeals may, on its own motion, review a decision of a Court of Appeals in a criminal case as provided by law.*** Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

(c) ***Subject to such regulations as may be prescribed by law***, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments. The court shall have the power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.

See Tex. Const. art. V, § 5.

[2] *See Roldan v. Sta*te, 739 S.W. 2d 868, 869 (Tex. Crim. App. 1987) (PDR ground denied summarily because "There was no disagreement upon a material question of law in the Court of Appeals."). See *also Degrate v. State*, 712 S.W.2d 755, 756 (Tex. Crim. App. 1986)[grounds proper for review on PDR are a court of appeals decision in conflict with the decision of another court of appeals; where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court; where a court of appeals has declared a statute unconstitutional; where the justices of the court of appeals have disagreed upon a material question of law; and where the court of appeals has departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Court's supervisory power].

[3] For example: (1) Was the objection to the exclusion of the sketch artist made when the lawyer first became aware?; (2) Was there a failure to object to the exclusion of the public during private conversations between prosecution and defense?; (3) Was there a reasonable alternative to afford Appellant a public trial?; and (4) Were the facts regarding the CSLI evidence regarding March 12, 2012 a pillar of the prosecution case in chief?

The facts found by the final decider of the facts on appeal, the 7th Court of Appeals, are:

That counsel objected as soon as he became aware of the closure of the courtroom when a media sketch artist was excluded.	See 7th Court of Appeals Opinion at page 36.
Counsel objected when the Court could take action and the Court understood the objection the second time the courtroom was closed.	See 7th Court of Appeals Opinion at pages 39.
The reasonable alternative to closing the courtroom was using the additional jury selection room that is fully functional as a courtroom and which was available.	See 7th Court of Appeals Opinion at page 36.
That seats remained in the courtroom when the bailiff excluded persons from closing argument on a one-person-in, one-person-out basis	See 7th Court of Appeals Opinion at page 36.
That the March 12, 2012 CSLI was important to show Shepard (the killer) and Dixon were present together in a place that Shetina and Sonnier (the victim) frequented.	See 7th Court of Appeals Opinion at page 24.
That this CSLI impeached Dixon's credibility that he was never present in Lubbock at the same time Shepard (the killer) was there.	See 7th Court of Appeals Opinion at page 24.

The Court of Criminal Appeals, usurping the Court of Appeals constitutional jurisdiction as final fact decider; acted outside its jurisdiction and reversed the Court of Appeals on these facts even though that Court applied the right legal test; did not decide the case in a manner that conflicted with a decision of a court of appeals decision on the same matter; did not decide an important question of state or federal law which has not been, but should be, settled by this Court; did not declare a statute unconstitutional; and the Justices did not disagree upon a material question of law. Contrary the Court of Appeals' fact determinations above, the Court of Criminal Appeals found opposite facts:

That counsel did not object as soon as he became aware of the closure of the courtroom when a media sketch artist was excluded.	See Court of Criminal Appeals Opinion at pages 7 and 11.
That counsel did not object when the Court could take action and the Court understood the objection the second time the courtroom was closed.	See Court of Criminal Appeals Opinion at pages 8, 12 and 13.
There was no reasonable alternative to closing the courtroom in which the trial was held.	See Court of Criminal Appeals Opinion at pages 9, 10 and 15.
That no seats remained in the courtroom when the bailiff excluded persons from closing	See Court of Criminal Appeals Opinion at pages 9, 10 and 15.

argument on a one-person-in, one-person-out basis	
That the March 12, 2012 CSLI was not important to show Shepard (the killer) and Dixon were present in the same location in Lubbock where Shetina and Sonnier (the victim) frequently danced because that was not the day that Sonnier was killed.	See Court of Criminal Appeals Opinion at page 4, 5 and 6.
That this CSLI was not the important evidence used to impeach Dixon's credibility that he was never present in Lubbock at the same time Shepard (the killer) was there.[4]	See Court of Criminal Appeals Opinion at pages 5 and 6.

Accordingly, by deciding these factual disputes, and reversing the COA's factual findings, this Honorable Court has ventured beyond its authorized jurisdiction, usurped that of the Court of Appeals, and violated the express language and terms of the Texas Constitution. This PDR did not present any question of what legal standard to apply, or what principle of law needed to be newly interpreted, or whether a statute was unconstitutional. This PDR presented factual matters, which this Court improperly decided.

[4] Dixon was not convicted in his first trial during which no CSLI evidence was admitted. He was convicted in this second trial, during which such evidence was admitted.

I. The Error Was Harmful.

Courts have long recognized that a witness's credibility can be the deciding factor in a defendant's guilt or innocence. As the Supreme Court explained:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue v. People of State of Ill., 360 U.S. 264, 269 (1959).

This principle is even more critical where the defendant is the testifying witness because his credibility will often be the deciding factor *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992) ("[W]hen the case involves testimony of only the defendant and the State's witnesses . . . the importance of the defendant's credibility and testimony escalates.").

In its opinion, this Court suggests that Dixon's "presence in Lubbock on some other day months before, even coupled with Shepard's presence and their conversation, was not particularly important to this prosecution." *Dixon v. State*, PD-0048-19, 2020 WL 220101 (Tex. Crim.

App. Jan. 15, 2020). However, as the lower Court highlighted, the State's claim that their data proved Dixon and Shepard communicated together in Lubbock and during critical times before and after Sonnier was murdered, rendered the CSLI a critical factor in the jury's evaluation of Dixon's credibility and involvement in Sonnier's murder. In trial one, where CSLI evidence as never introduced, Dixon was not convicted. This differs from trial two where the CSLI evidence was heavily relied upon by the State, and ultimately led to Dixon's conviction.

This Honorable Court accurately noted that Dixon's CSLI "showed he was in Lubbock on March 12, 2012." *Dixon*, 2020 WL 220101. Again, March 12 was critical to the State's case because it allowed them to insinuate Dixon was in Lubbock with Shepard at the dance studio that the victim, Sonnier, and Shetina frequented. It was key evidence to impeach Dixon on cross-examination with that information to show he was allegedly a liar and had helped Shepard kill Sonnier. Noting that the CSLI was used to show a coordination with Sheppard's location, the State argued that fact alone called into question Dixon's credibility.

> **State:** Is there any doubt in your mind now that Mike Dixon was with Dave Shepard on the D'Venue on the March the 12? He looked you in the eye and said, "Nope, never been to Lubbock with Dave

> Shepard before." And we - - all these things hinge on the credibility of the Defendant.[5]

However, the evidence shows Dixon was not in Lubbock with Sheppard on March 12. It is well settled that harm is found when the state asks questions about a matter and argues the same. See below.

A. This Court Conducted an Improper Harm Analysis

This Court misapprehends Justice O'Connor's concurrence in *Duckworth v. Eagan*. *Dixon*, 2020 WL 220101, fn 11. In *Eagan*, the Supreme Court was considering "whether informing a suspect that an attorney would be appointed for him 'if and when you go to court,' renders *Miranda* warnings inadequate." *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989). Although Justice O'Connor's concurrence suggests "evidence seized in violation of the Fourth Amendment may be used for impeachment purposes," the Supreme Court has never expressly adopted that position. *Id*. at 208 (O'Connor, J., concurring) (citing *Walder v. United States*, 347 U.S. 62, 65 (1954). And five circuit courts of appeal recognize *Miranda* overruled *Walder*. *See, e.g*., *United States v. Birrell*, 276 F. Supp 798, 817 (S.D.N.Y. 1967) (declining to follow *Walder*

[5] (22RR96).

"[b]ecause [its] precedential authority . . . has been so seriously attenuated and because the trend of current constitutional developments points in another direction . . ."). The Fifth Circuit has also questioned whether *Walder* remains valid post-*Miranda*. *See Agius v. United States*, 413 F.2d 915, 920 (5th Cir. 1969). If anything, *Walder* reaffirms "[t]he Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction." *Walder*, 347 U.S. at 64–65.

Assuming, *arguendo*, *Walder* stands for Justice O'Connor's proposition, the facts in *Walder* are entirely distinguishable from Dixon's. In *Walder*, unlawfully seized evidence used against a defendant in a drug possession case was suppressed, which led to a dismissal. *Id*. at 63. The defendant was subsequently re-indicted on four more drug charges. *Id*. At trial, on direct examination, the defendant denied being involved in narcotics dealing. *Id*. On cross-examination, the defendant again denied he was involved in criminal activity. *Id*. Over objection, the government questioned the defendant about the previously suppressed evidence. *Id*. at 64. According to the Supreme Court, the defendant's denial on direct examination opened the door. Consequently, in *Walder*, the government

was allowed to attack the defendant's credibility in order to impeach his testimony. *Id*. Thus, it is not law in the U.S. Supreme Court that suppressed evidence may be used for impeachment, absent the defendant opening the door by using the evidence himself.

Here, Dixon's unlawfully obtained CSLI was never suppressed. Unlike *Walder*, Dixon did not attempt to use suppressed evidence to his advantage because the CSLI was not rendered unlawful until the Supreme Court decided *Carpenter v. United States*. Importantly, the suppressed evidence in *Walder* was not directly related to the defendant's subsequent trial. Comparably, we cannot assume the State would have used the CSLI to impeach Dixon had the evidence been suppressed pretrial. *Cf. Walder*, 347 U.S. at 64 ("Over the defendant's objection, the Government then questioned him about the heroin capsule unlawfully seized from his home . . . .").

The State's reliance on Dixon's CSLI weighed heavily against Dixon's credibility. Although the State presented a gas receipt placing Dixon in Plainview, Texas. This evidence was meaningless without his CSLI. Moreover, this Court's assertion that "[t]he shortest route from Amarillo to Lubbock goes straight through Plainview," is an improper

addition to the appellate record, and constituted an appellate determination of a fact outside the record before this Honorable Court. Reviewing courts should not, absent limited exceptions, take judicial notice of facts outside the record. *Dixon*, 2020 WL 220101; s*ee also Gaston v. State,* 63 S.W.3d 893, 900 (Tex. App.—Dallas 2001) ("As a general rule, appellate courts take judicial notice of facts outside the record only to determine jurisdiction over an appeal or to resolve matters ancillary to decisions that are mandated by law . . . ."). This was neither. And, this Court may not determine facts on a PDR.

B. This Honorable Court Applied the Wrong Standard

The test for determining whether a constitutional error is harmless "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Here, the State did not prove that the error was not harmless beyond a reasonable doubt. One determines harmful error by determining whether the state questioned witnesses about the matter or argued it to the jury. The State emphasized Dixon's CSLI from their opening statements, through multiple witnesses in its

case-in-chief, by introducing of maps, records, explaining same with PowerPoints during its closing argument. *Cf. Love v. State*, 543 S.W.3d 835, 857 (Tex. Crim. App. 2016) (noting that "the State relied heavily on [the] text messages to prove its case"). Under this Court's test, the error was harmful. And the State did not establish that it had no effect on the verdict beyond a reasonable doubt.

II. Public Trial

The denial of public trial during proceedings against a defendant is structural error that requires no showing of harm. *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984). This Court in its review of the Court of Appeals' decision regarding public trial, based its decision solely on facts relating to error preservation concerning the three courtroom closures during Dixon's trial.

Texas Rule of Appellate Procedure 33.1(a)(1) clearly states that an objection must be made at the earliest possible opportunity, as soon as the party knows or should have known that error occurred. In its opinion, the Court suggests that Dixon "failed to meet his burden to show preservation as to the second and first instance" of courtroom closure.

This Honorable Court inaccurately noted that Dixon failed to meet this burden during the first instance of courtroom closure because the record does not reveal when counsel became aware of the closure. The record is clear on when counsel became aware of this exclusion and when they timely objected to same.

> **Court:** For the record, we don't have any extra space in the courtroom. He's seated in the jury box because of the fact we don't have a place for him to sit in the audience.[6]
>
> **Counsel:** All right. Just to make sure the record is clear, I'd move for a mistrial.[7]

Although the State argued that Appellant's objection was untimely, the exclusion occurred without notice to either counsel, and defense counsel made a timely objection immediately upon learning of same by the Court's statement regarding the sketch artist seated in the jury box. The error was preserved. *Taylor v. State*, 489 S.W.2d 890, 892 (Tex. Crim. App. 1973) [stating that a showing that appellant did not have the opportunity to object at the time of the error preserved the complaint.]

Concerning the second instance of courtroom closure, this Honorable Court was incorrect in finding that Appellant failed to meet

[6] (4R19).
[7] (4R19).

his burden in showing his timely preservation of the error. During a portion of the. trial, an objection was made. During the voir dire of a State witness. The judge released the jury and the parties began arguing, to which the Judge took control of the situation.

> **Court:** Hey, y'all chill out. Everybody—if everybody would please excuse yourself from the courtroom except for the attorneys.[8]
>
> **Counsel: Hurley** That's a violation of Presley v. Georgia.[9]
>
> **Court:** From now on one person asking questions will be the one that makes objections. None of this all four people making any objections. Is that understood?[10]
>
> **Counsel: Hurley** I understand the Court's ruling. I just need to advise the Court if I believe that there's a Constitutional violation going on--[11]
>
> **Court:** Well you can advise Mr. Sellers, and he can make that objection.[12]
>
> **Counsel: Hurley** Sometimes it's not timely. And, of course, the Court knows if. The. Objection is not timely made its waived, and I don't want to have to face an allegation of ineffective assistance of counsel in the

[8] (7R143).
[9] (7R143).
[10] (7R143).
[11] (7R143).
[12] (7R143).

future. So I'm going to continue to object to Constitutional violations.[13]

The parties then continued on with conversations regarding other matters until counsel went on the record again.

Counsel: Hurley I want to say for the record that the Court has excused about 50 people from the gallery, and they are not present for this conference, this discussion we're having. We object under the 6th Amendment, the 14th Amendment and right now it's basically all lawyers and staff from the D.A.'s office in the courtroom and all of the public has been excused.[14]

Court: Well, there's going to be a $500.00 fine for everybody that makes some comment other than asking questions. These side-bar comments are going to stop, or you are going to start writing checks, every one of you. Anybody have any questions about this?[15]

The record explicitly shows that Appellant's counsel objected timely and continued to object to the constitutional violation, when the Court excluded the public from the courtroom. In fact, counsel only refrained from continuing with their objections to the Constitutional violation during this time due to the Court's order and its threat of a contempt $500 fine if they did anything else but ask questions. They were

[13] (7RR144).
[14] (7RR146).
[15] (7RR146).

prohibited from making further objections based on the Court's statement and were therefore not allowed to do so. Thus, the objection was made timely, and at a time the Court could do something about it, and also, the judge's statement of threatening fines on counsel was his ruling, and a denial of Appellant's objection to the constitutional violation. Appellant's objection to this courtroom exclusion was timely made under *Presley*, and therefore preserved.

Moreover, the trial Court had the duty to take very reasonable measure to accommodate the public. *Presley v. Georgia*, 558 U.S. 209 (2010); *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012); *Cameron v. State*, 482 S.W.3d 576 (Tex. Crim. App. 2016). Both the United States Supreme Court and this Court have made clear that in order to satisfy the 6th Amendment's command that every citizen is entitled to a public trial, trial courts must abide by this. *Id*. This Court improperly found that there was no error regarding the third closure of the courtroom, as the trial Court failed to accommodate the public attendance during Appellant's trial.

During the motion for new trial hearing, testimony was elicited that two sheriff's deputies were standing in the hallway of the courthouse and

preventing members of the public from entering the courtroom during closing arguments.[16] In fact, the Sergeant of Courtroom security testified that he could not say whether or not the courtroom was full.[17] Further, the Court considered no reasonable alternative to the one-in-one-out rule imposed by the bailiffs, while there were ample seats available for the members of the public seeking admittance. The remaining open seats in the courtroom should have been utilized or the Judge should have considered using the central jury room, which was suitable as a courtroom and available, to conduct the trial.[18] Both were reasonable alternatives that the Court should have considered in order to satisfy the requirements under *Presley*.

This Court relied on a concurring opinion by Justice Harlan in *Estes v. Texas,* stating that "the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats." *Estes v. Texas*, 381 U.S. 532, 588-89 (1965). Here, there were seats available, as corroborated by testimony during the motion for new trial hearing. In fact, there was another room

[16] (23R22-23, 29-30).
[17] (23R38).
[18] (23R42–43; 23R23–24).

available to hold the trial that had a higher capacity. The Court did not accommodate public attendance during the trial proceedings and this was a violation of Dixon's right to a public trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Motion for Rehearing was served on opposing counsel Lauren Murphree, Assistant Criminal District Attorney in Lubbock County, Texas via the state e-filing service, on this 29 day of January 2020.

By: */s/Cynthia E. Orr*
CYNTHIA E. ORR

CERTIFICATE OF COMPLIANCE

I certify that this Motion for Rehearing complies with Texas Rule of Appellate Procedure 9.4(i)(1), (3), and contains 3794 words according to the computer program used to prepare this motion.

By: */s/Cynthia E. Orr*
CYNTHIA E. ORR